

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY DOSS,

Defendant-Appellant.

UNPUBLISHED

October 7, 1997

No. 189214

Eaton Circuit Court

LC No. 95-000055 FC

Before: Doctoroff, P.J., and Kelly and Young, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, carrying a concealed weapon, MCL 750.227; MSA 28.424, and first-degree retail fraud, MCL 750.356c; MSA 28.588(3). Defendant was sentenced to concurrent prison terms of six years and eight months to ten years on the assault with intent to do great bodily harm conviction, three years and four months to five years on the carrying a concealed weapon conviction, and one year and four months to two years on the first-degree retail fraud conviction. We affirm.

Defendant first argues that he was denied a fair trial because the lower court gave an erroneous instruction regarding the testimony of one of the defense witnesses. Since defendant failed to object, appellate review is precluded unless failure to review the issue would result in manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Having reviewed the record, we find no manifest injustice. In instructing the jury, the court attempted to adapt the standard jury instruction regarding accomplice witnesses called by the prosecution (who might be motivated to testify by a promise of more lenient treatment)¹ to an accomplice witness called by the defense. The court instructed the jury to consider the accomplice's testimony carefully, and suggested that the jury could acquit defendant based on that testimony if it "proves the defendant is not guilty." However, the court immediately recognized that the purported modification shifted the burden of proof to defendant, corrected itself, and advised the jury that defendant did not have to prove his innocence and that the credibility of the accomplice witness should

be evaluated like that of any other witness. We conclude that the trial court's instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). There was no error requiring reversal.

Next, defendant argues that the trial court should have granted his motion for a directed verdict on the charge of assault with intent to commit murder, of which defendant was eventually acquitted, because there was insufficient evidence of the specific intent to murder. When reviewing a challenge based on the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992).

"The elements of assault with intent to commit murder are: (1) an assault, (2) with the specific intent to commit murder, (3) which, if successful, would make the killing murder." *People v Rockwell*, 188 Mich App 405, 411; 470 NW2d 673 (1991). In this case, the prosecution's evidence established that defendant stabbed the victim with an instrument resembling an ice pick, and that defendant threatened to kill him. Intent to murder may be proven by circumstantial evidence, including, but not limited to, the nature of the assaultive act, whether the weapon is "naturally adapted to produce death," and defendant's conduct and declarations. *People v Guy Taylor*, 422 Mich 554, 567-568; 375 NW2d 1 (1985) (citation omitted). Based on the evidence presented, the trial court did not err in sending the case to the jury on the charge of assault with intent to commit murder.

Defendant also contends that the evidence was insufficient to sustain the conviction for assault with intent to do great bodily harm. We disagree. Again, the testimony established that defendant used the ice pick-like instrument to stab the security guard and also threatened to kill him. Viewing this evidence in a light most favorable to the prosecution, a rational juror could infer that defendant acted with an intent to inflict great bodily harm. *Wolfe, supra* at 515.

Defendant next argues that he was denied the effective assistance of counsel at trial. Specifically, defendant claims that defense counsel failed to impeach the victim's trial testimony with prior inconsistent statements made during the preliminary examination. Defendant also contends that counsel failed to produce photographs of his post-arrest injuries that would have been relevant in establishing that he acted in self-defense. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Since defendant did not file a motion for a new trial nor request an evidentiary hearing on this basis, our review is limited to errors apparent on the record before us. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

Our review of the record indicates that counsel did in fact use the victim's preliminary examination testimony in an effort to impeach his trial testimony. Thus, defendant's first claim lacks factual support. With respect to the photographs, we are unable to conclude on the record before us

that counsel's failure to produce them at trial substantially limited defendant's claim of self-defense. Consequently, defendant has failed to establish that he was denied the effective assistance of counsel on this basis.

Defendant next raises two issues regarding his right to testify. Defendant first argues that the trial court should have ascertained on the record whether he intelligently and knowingly waived his constitutional right to testify. As defendant acknowledges, there is no such duty. See *Bell, supra* at 277; *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991); *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985). We also reject defendant's related claim that he was denied the effective assistance of counsel because counsel advised him not to take the stand. This was a matter of trial strategy that we will not second guess on appeal. *Simmons, supra* at 685-686.

In his last claim of error, defendant challenges his sentence on several grounds. Defendant first argues that he should be resentenced because offense variable six (OV 6) (multiple victims) was incorrectly scored. We reject defendant's argument because it is directed at the trial court's "calculation of the sentencing variable on the basis of [its] discretionary interpretation of the unchallenged facts," rather than the accuracy of the factual basis for the sentence. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). Since the sentencing guidelines do not have the force of law, "[t]here is no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guidelines variables." *Id.* at 176-177.

Defendant also contends that the trial court improperly based its sentencing decision on its belief that defendant suborned perjury. However, the record simply does not support defendant's claim of error. We also reject defendant's claim that the trial court made an independent finding that defendant was guilty of assault with intent to commit murder, contrary to the jury's verdict, as a reason for justifying the sentence imposed. We are unable to conclude on this record that the trial court improperly sentenced defendant on this basis. While the trial court was apparently dissatisfied with the jury's verdict, the court correctly stated that it had to respect that verdict, and noted that the "worst offense here" for purposes of sentencing was assault with intent to do great bodily harm.

We also reject defendant's claim that his six-year and eight-month minimum sentence was disproportionate. We note initially that defendant's sentence falls within the guidelines range and is therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has failed to cite any "unusual circumstances" rendering his presumptively proportionate sentence disproportionate. See *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Also, considering that this was a serious, assaultive crime, that defendant has refused to take responsibility for his actions, and that defendant had six prior convictions, including one felony, the trial court did not abuse its discretion in sentencing defendant to the maximum minimum sentence recommended by the guidelines. In sum, the sentence was proportionate considering the circumstances of this offense and this offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Finally, in a supplemental brief, defendant maintains that he is entitled to resentencing on the basis that the trial court incorrectly scored prior record variable two (PRV 2) (prior low severity felony convictions). Defendant argues that the scoring error is based on a factual inaccuracy, and, therefore, is subject to appellate review despite the Supreme Court's decision in *Mitchell, supra*. However, because defendant failed to raise this issue at sentencing, it has not been preserved for appeal. MCR 6.429(C). Accordingly, we decline to review it.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Michael J. Kelly

/s/ Robert P. Young, Jr.

¹ See CJI2d 5.6.